United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-1573

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1573-A

H. PERINE,

Plaintiff-Appellant,

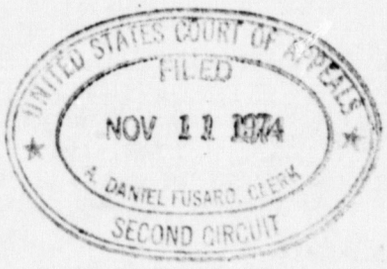
-against-

WILLIAM NORTON & COMPANY, INC., WILLIAM NORTON, ELINORE NORTON and DESIGNCRAFT JEWEL INDUSTRIES, INC.,

Defendants

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLANT's BRIEF IN ANSWER
TO SEC's AMICUS CURIAE BRIEF.



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PLAINTIFF-APPELLANT's BRIEF IN ANSWER TO SEC's AMICUS CURIAE BRIEF.

Plaintiff-Appellant submits this brief in response to the SEC's amicus brief herein. While the SEC generally speaks ex cathedra with respect to its own regulations it is our respectful submission that the SEC's present interpreting of its Regulation 16b-2 is demonstrably erroneous.

In any event, in view of the fact that the SEC instituted administrative proceedings against NORTON for manipulative activities during the underwriting of Designcraft stock on the same day that the District Court entered its judgment herein in favor of NORTON it is further respectfully requested that in any event this Court reverse such judgment in favor of NORTON so as to permit plaintiff to proceed against the defendants herein in the light of such new facts and consistent of course with the Court's opinion herein.

A.

The SEC asserts in its amicus brief that until 1952 when the Regulation took its present form, the language "beneficial owner, directly or indirectly, of more than 10 per centum of any class of equity security" contained in the condition requiring equal participation with non-insiders referred not to a 10% stockholder of the issuer but rather to a 10% stockholder of an underwriter which underwriter in turn was a director or officer of the issuer. Under this view the condition of equal participation with non-insiders in the Regulation is totally inapplicable to 10% stockholders of the issuer, even to 10% stockholders who were such prior to the underwriting, that is even to <u>preexisting</u> 10% stockholders.

The SEC's presently drawn distinction between

directors and officers, on the one hand, and 10% stockholders, on the other, is diametrically opposed to what the SEC states in its releases respecting the Regulation through the years, as follows:

In Release No. 535(Class B) issued on March 19, 1936, the SEC stated unqualifiedly (see plaintiff's main brief herein, p. 27); "The rule is applicable to individuals acting as underwriters if they are officers, directors or principal stockholders of the issuer, and to underwriting corporations or firms if they are principal stockholders of the issuer." (underlining supplied)

Also in Release No. 535 (Class B) the SEC further specifically indicated (plaintiff's main brief, p. 27) that the Regulation is applicable to "any person who, with a view to distribution acquires more than 10% of the equity securities of the issuer".

Indeed, in Release No. 3907 issued on January 29, 1947, the SEC specifically said that the condition requiring equal participation with non-insiders is applicable to all three classes of stockholders, that is, directors, officers and 10% stockholders. (plaintiff's main brief, p. 32):

Thus, according to the SEC's releases, the Regulation

made no distinction as between different classes of insiders, contrary to the present SEC's amicus brief which states (p. 10), "Until 1952 those conditions [requiring equal participation with non-insiders] were expressly made applicable only to underwriters whose insider status resulted from an officer or director relationship."

In any event, the SEC concedes as it must that the Regulation in its present form does not upon its face make any distinction of any kind as between different classes of insiders. Thus, the SEC states in its brief (p. 11) that "the present blanket requirements [of the Regulation]...draws no such distinction" between insiders. However, the SEC is ready to jettison the plain and unequivocal language of the present Regulation in favor of a postulated distinction between insiders based, at best from its viewpoint upon a highly obscure history of the Regulation.

The SEC seeks to justify the distinction between a 10% stockholder, on the one hand and directors and officers, on the other, by the rationale that 10% stockholders are not in a position to use their insider position to acquire a preferential position in the underwriting because "any preferential position that such an underwriter may obtain is the result of

negotiations which antedate his insider status" (SEC's brief, p. 13). This rationale cannot be squared with the fact that SEC's reading of the Regulation's history makes the condition requiring equal participation inapplicable to all 10% stockholders, including a preexisting 10% stockholder. This contention also cannot be squared with the rule of Stella that obtains in this Court or indeed with the SEC's amicus brief in Stella (a copy of which has been supplied to this Court and the pertinent quote from which is set forth, in plaintiff's main brief, p. 17).

B.

The SEC instituted administrative proceedings against NORTON on or about April 2, 1974 charging NORTON with, among other things, manipulative activities during the underwriting of Designcraft's stock and thereafter. The District Court entered its judgment herein in favor of NORTON also on April 2, 1974.

In view of the new facts of the SEC's proceeding against NORTON, it is respectfully requested, in the interests of justice, that in any event the judgment in favor of NORTON be reversed so as to permit plaintiff to proceed against the defendants herein in such manner as he may deem advisable in the light of such new facts, consistent of course with the

Court's opinion herein. Thus, subject to the Court's decision herein, plaintiff would assert that defendants are liable under Section 16(b) for failure to satisfy the Regulation's condition of "good faith" participation in the underwriting and also that defendants are liable under Section 10(b) of the 1934 Act for manipulative activities.

Dated: New York, N. Y.
November 8, 1974

Respectfully submitted,

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STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

ENNA PADIN, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 83-20 Britton Avenue, Elmhurst, New York. That on the 8th day of November 1974, deponent served the within Plaintiff-Appellant's Brief upon the attorneys listed below at their respective addresses, the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository maintained at 41 East 42nd Street, New York, New York 10017 under the exclusive care and custody of the United States Post Office Department within the State of New York.

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Enna Padin
Enna Padin

Sworn to before me this 8th day
of November, 1974.

Regina V. Sosinski

REGINA V. SOSINSKI
Notary Public, State of New York
No. 41-0111054
Qualified in Queens County
Commission Expires March 30, 197_